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Ideas in Another Place?

Liberal Constitution and the Codification of Private Law at the Turn of the 19th Century in Brazil*

1 Introduction

The debate concerning the introduction of liberal legal-political conceptions in Brazil is historically concentrated on the divergence between two basic views: one points to a detachment from cultural authenticity through the absorption of foreign elements which deny Brazil's – or the Brazilian Nation's – identity, singularities or peculiarities; the other suggests a deficiency, a flaw in our capacity to implement liberal values, superior in terms of civilisation and to be followed as models. Beyond the sphere of politics and law, the first orientation finds a literary expression in a famous passage by Machado de Assis: "The real country is good, it reveals the best instincts; but the official country is caricaturaland burlesque."[1] He added: "There are certain political

* Translated from Portuguese to English by Adriano Gomes with a technical revision by Carolina Lemos and Luiz Cláudio Pinto.

1 Machado de Assis (1955 [1861]) 104. I do not find it adequate, therefore, to relate the origin of this opposition between a "real country" and an "official country", also expressed in the search for "the profound" identity of Brazil, to the artistic and literary movement that was manifested in the Modern Art Week, which took place in São Paulo in 1922, with an emphasis on Mário de Andrade, and to associate it with the adoption of democratic-social, socialist or fascist ideas in the 1920s and 1930s in Brazil, as suggested by Lopes and Garcia Neto (2009) 27. Likewise, it would be inappropriate to associate the similar reference to the "distance between legal and real country" with the emergence of these ideas at that time, and, especially, with the difference in American realism between "*law in books*" and "*law in action*" (Lopes and Garcia Neto [2009] 15 e 21–22 – these authors eliminated this reference to American realism in the definitive Spanish edition of that article; see Lopes and Garcia Neto [2011] 125–126). It is, as expressed by Machado de Assis, a debate founded in the 19th century. See also note 3.

fortunes in our land that cannot be explained".[2] The opposing orientation is expressed in a statement by Tobias Barreto in which he compared the experience of the moderating power, established by the Constitution of 1824, with English parliamentarism: "The institutions that are not born of custom, but are an abstract product of reason, cannot stand the trial of experience for very long, and soon find themselves broken before the facts. Indubitably, our government is in such a state".[3] He added: "But it is important not to forget that the complicity of the people plays a role in the production of our misfortunes".[4] These two ways of considering the relationship between "real country" and "official country" or, from the political-legal point of view, dealing with the presence of liberal ideas and institutions of European origin in Brazil are diverse expressions of a self-understanding which was suggestively called "misplaced ideas".[5]

2 Machado de Assis (1955 [1861]) 105. This excerpt suggests that what is placed out of the system of science was not the "real country" but the "official country", unlike what can be inferred from Schwarz (2000 [1977]) 11 [Engl. transl. (1992) 19] when he sustains that the argument of a liberal pamphlet, which was contemporary to Machado de Assis, "places Brazil outside the system of science".

3 Barreto (2000 [1871]) 383. In this context, he criticises the idea that the neutral power (according to the notion of "real power" in the formulation by Constant (1957 [1815]) 1078 ff., (1872 [1914–1918]) 177 ff. would have passed "rapidly from the books to the facts": "The simple copy of a theoretical principle in an article of the Constitution does not mean that an idea has become reality. This is simply copying from one book to another book, without losing its state of pure theory", Barreto (2000 [1871]) 395.

4 Barreto (2000 [1871]) 383. The affirmation of Sílvio Romero is associated with this formulation based on the positivism and evolutionism in vogue at the time: "It is certain that the primitive inhabitants of the country have not overcome the final steps of savagery; it is also sure that our current civilisation is impregnated with barbarism. Only foolish patriots would challenge this", Romero (1960 [1888]) 83. However, Barreto had reservations in his negative assessment of the Brazilian political experience: "It is clear that is not only the good side, but also the bad side of the English government, indispensable to the conservation and harmony of the whole, that cannot be transmitted to any other country", Barreto (2000 [1871]) 417.

5 Schwarz (2000 [1977] [Engl. transl. 1992]). Although, in a posterior essay, Schwarz (2012) seeks to move away from this self-comprehension, his famed text is ambivalent in this respect, for he himself uses the expression "inadequacy in our thinking" (2000 [1997]) 13 [Engl. transl. (1992) 20], highlighting that "our improper discourse was hollow even when used properly" (21 [Engl. transl. 25]), to conclude: "In the process of reproducing its social order, Brazil unceasingly affirms and reafirms European ideas, always improperly" (29 [Engl. transl. 29]). I will return to this issue in the final observations.

Underlying this debate is the conception that Brazilian society has a particular identity, which distinguishes it from the European societies. From this conception derives the constant search for the peculiarity, singularity or authenticity of Brazil. In this context, the notion of society is linked to the politico-cultural concept of national state, involving territoriality itself. "Nation" as a cultural concept plays in the romantic tradition of the 19th century a decisive role. The Brazilian nation is presented as a cultural expression of a particular society, whereas the state is understood as a political manifestation of the nation. From this results a semantics and structure proper to the Brazilian society, which would allow its comprehension and explanation. It is in this sense that the label "interpreters of Brazil"[6] was conceived.

I assume, however, the theoretical supposition that modern society emerges as a world society.[7] Unlike pre-modern societies, territorially delimited formations, the mundialisation of society has developed itself from the 16th century on, was intensified during the 19th century and was consolidated at the end of the 20th century with the affirmation, including in the semantic sphere of self-description, of world society through the discourse of globalisation.[8] Even though the economic system was originally the propellant of the emergence of world society, it is not only a characteristic of capitalism or the economic system.[9] A main characteristic of world society is that the horizon of communications and expectations becomes, *primarily*, global, not limiting itself to a determined territory.

This is why the relationship between semantics and structure should be considered, primarily, from the point of view of the world society. Considering semantics as "a socially available sense that is generalised on a higher level and relatively independent from specific situations",[10] one may inquire how semantic constructions could assert themselves as self-descriptions of world society taking into account the presence, in this society, of such distinct

6 For an overview, see Santiago (2002). In this theoretical context, talking about Brazilian society and discussing good and evil societies is still common (see, e.g. Villas Bôas Filho [2009] 337).

7 Neves (2009) 26 ff.; (2008) 215 ff. See Luhmann (1975), (1997) 145–171.

8 Neves (2009) 27–28. See Luhmann (1997) 148; Brunkhorst (1999) 374.

9 See Luhmann (1997) 158–159, with objections to the concept of capitalism as a "world system" as proposed by Wallerstein (2006).

10 Luhmann (1980) 19.

situations on the structural plan (socially stabilised expectations). Firstly, it is important to observe that "ideas cannot arbitrarily vary in relation to the society that makes use of them. Therefore, the theoretical problem shifts to the question of establishing through what and in what way the structure of society limits arbitrariness."[11] Secondly, one should underline that, considering complexity and differentiation as fundamental to the connection between structure and semantics, the "particular and general relationships between the structure of society and semantics walk, therefore, side by side and influence one another reciprocally."[12] This does not prevent semantic artefacts from becoming obsolete when confronted with new emerging structures.[13] However, it is undeniable not only that semantic innovations result from structural transformation, but also that a new semanticsstimulates changes in the social structure. The matter gets more complicated when this relationship is considered at the level of world society. A semantic artefact of global society may change in view of its adjustment to the reproduction of structures in diverse social contexts. Moreover, it is important to distinguish between semantics which refers to cognitive structures and semantics which refers to normative structures.

Because the cognitive structures of economics, technique and science do not segmentally differ in the sphere of world society, the predominant semantics in these domains has the potential of presenting itself emphatically on a global level, being of little importance the structural regional differences. Therefore, the local alternative semantics is widely neutralised, since it remains subordinated to the semantics of global society: self-description of production, circulation, market, competitiveness, efficiency etc. However, with regard to the normative structures of law and politics, territorial segmentation into states rises not only the question of the confrontation between world semantics and such varied structures, but also the problem of semantic artefacts which refer to normative structures that are reproduced in the respective state.

Within the world semantics of liberalism there is an aspect related to cognitive structures which serves the self-description of the capitalist econo-

11 Luhmann (1980) 17.
12 Luhmann (1980) 34.
13 "If the level of complexity changes, the guiding semantics of experiencing and acting must adapt to it, otherwise it loses the connection to reality." Luhmann (1980) 22.

my, with a strong tendency to neutralise semantic alternatives. By its turn, liberalism as legal-political semantics has a strong normative dimension. This means that, during the 19th and 20th centuries, the liberal semantics of world society not only was submitted to tests of adequacy in light of normative structures of the states in which they were adopted, but were also pervaded by local semantics which subverted, to a large extent, its original meanings and functions. Certain shifts transmute ideas. Based on these suppositions, I shall analyse the liberal semantics that refers to the constitutionalism and codification of private law in the Brazilian experience at the turn of the 19thcentury to the 20th century. Instead of "misplaced ideas", would it not be important to inquire into the meaning and function of the development of ideas in another place or, better still, in various places of the global society? Would society *in* Brazil at the turn of the 19th century to the 20th century – delimited by the state as a territorial legal-political organisation – not be one of these places in which liberal ideas not only radiated themselves as pertaining to the dominant or hegemonic semantics of world society in relation to the normative structures, but were also confronted with local anti-liberal semantics?

In the following exposition, I shall initially analyse the factors which obstructed the unified codification of private law or the codification of civil law during the 19th century, despite its explicit provision in the imperial Constitution of 1824 (item 2). In the second part, I will consider the limits of the normative concretisation of the republican Constitution of 1891 in view of the dominant legal-political structures and practices in Brazil during the First Republic, indicating its symbolic significance (item 3). Subsequently, I shall conduct a brief evaluation of the meaning and function of the civil codification accomplished in 1916 in the Brazilian context during the first two decades of the 20th century (item 4). Lastly, in my final remarks, I will consider that the adoption of the social, socialist or fascist ideas in the 1920s and 1930s does not alter substantially the scenario of a semantic shift of ideas in the Brazilian legal-political experience, a situation that, to a certain extent, lasts until today. I shall also emphasise the asymmetry in the circulation of liberal ideas within the world society, as well as the paradox between the locality and worldliness of their meaning and functions (item 5).

2 The absence of a unified codification of private law or codification of civil law in Brazil in the 19th century

After the declaration of independence in 1822, the Law of 20 October 1823, issued by the Constituent Assembly, maintained in effect the "Filipinas" Ordinances , laws, permits, decrees and resolutions promulgated by the Kings of Portugal before 25 April 1821, while a new code was not enacted.[14] With the dissolution of the Constituent Assembly in November 1823, the Emperor proclaimed the imperial Constitution of 1824,[15] in which the article 179, item XVIII, established that a civil code should be organised as soon as possible.[16] Despite many efforts to implement this constitutional provision, it was not accomplished during the imperial period.

The "Filipinas" Ordinances – issued in 1603, when Portugal was under Spanish rule, and confirmed by the Law of 29 January 1643 – remained in effect during the entire monarchical period and lived on, underthe terms of article 83 of the Constitution of 1891,[17] during the first 25 years of the republican regime until 31 December 1916, completing 314 years of validity in Brazil.[18] Its anachronism lied in the attribution of "extrinsic authority to the opinions of Accursio and Bartolo at a time when they were already discredited".[19] In its application, arguments of authority were practically dominant and judges were satisfied with "attaching to their decisions a long procession of authors, not only lawyers, but also moralists and casuists, which at the time constituted *common opinion*".[20] The law of 18 August 1769, issued under the regime of Marquês de Pombal, called the Law of Good Reason,

14 See Pontes de Miranda (1981 [1928]) 66; Gomes (1958) 12–13; Alves (2003) 3.

15 See Neves (1992) 116–121, with numerous bibliographic references.

16 "XVIII. It shall be put together, as soon as possible, a Civil and Criminal Code, founded in the solid bases of Justice and Equity."

17 "Article 83 – The laws of the old regime that are not explicitly or implicitly opposed to the Government systemestablished by the Constitution and the principles consecrated in it remain in effect, until revoked". In respect to this constitutional disposition, Pontes de Miranda enlightens: "Due to the *implicit* revoking the following institutions could no longer last, and so was understood: penalty servitude, civil death, difference between children of nobles and children of workers in the right of succession, etc."

18 Gomes (1958) 8 and 13. See Pontes de Miranda (1981 [1928]) 41 ff.

19 Gomes (1958) 9.

20 Pontes de Miranda (1981 [1928]) 43–44. This author adds (44): "Likewise, the allegations of the lawyers were reduced, largely, to accumulation, as extensive as fastidious, of remissions, almost always copied, and mostly inappropriate".

attempted to confront this problem by offering criteria for interpreting and integrating the legal gaps and by demanding that the opinions of the magistrates were scrutinised in the light of "good reason", even establishing, in its § 13, that Accursio and Bartolo were destituted of the authority granted by the "Filipinas" Ordinances (§ 1 of title 64, book 3).[21]

With the changes introduced by the Law of Good Reason, the "Filipinas" Ordinances persisted until the first quarter of the Republic, at the mercy of what had been determined by the imperial Constitution (1824) itself: the elaboration of a civil code "as soon as possible". All attempts in this respect were unsuccessful.

On 15 February 1855, the jurist Teixeira de Freitas was put in charge of consolidating the legislation in effect in Brazil prior to the independence, including laws from Portugal.[22] The intention was to consolidate, classify and order with the purpose of later codifying; or, in the words of Pontes de Miranda, "to know first in order to express oneself."[23] In 1857, Teixeira de Freitas concluded his "*Consolidation of Civil Laws*",[24] largely organising the "sparsest and loosest legislative elements in force at the time, which were originated from 1603 to 1857".[25] However, Teixeira de Freitas ignored slavery in his consolidation, an institution on which the economic and legal structure of the Brazilian Empire was based. In this sense, he justified his standing in the introduction of his work:

> "It is important to notice that the issue of *slaves* is not addressed in any part of the new text. We have, it is true, slavery among us; but, if this evil is an exception, which we lament, condemned to extinction in a more or less remote time, let us make also an exception, a separate chapter, in the form of our Civil Laws; let us not stain them with shameful dispositions, not suitable for posterity; let the *state of freedom* remain

21 See Pontes de Miranda (1981 [1928]) 44 ff.; Gomes (1958) 9 ff.

22 Meira (1983) 94; Gomes (1958) 18.

23 Pontes de Miranda (1981 [1928]) 79. However, Pontes de Miranda's assertion should be qualified with respect to what actually came to be "consolidated" for the Consolidation also had an innovative character for legal Brazilian Empire (see Fonseca [2012] 26 ff.).

24 Freitas (2003 [1857]). After the first official edition in 1857, the second edition in 1865 and the third edition in 1876, the fourth edition was published, with the *Additions* in response to criticism, in 1877; in 1915, the fifth edition was published with the new laws and decrees enacted until 1913 (see Mártinez Paz [1927] XXIX). For the analysis of reach and content of the *Consolidation*, see Meira (1983) 111 ff.

25 Pontes de Miranda (1981 [1928]) 80.

> without its odious correlate. The laws concerning slavery (which are not many) will be classified separately and will form our *Black Code*".[26]

This formulation is in itself a symptom of the problematic coexistence with liberal legal ideas in the context of imperial Brazil. The modern notion of civil law as a normative expression of private autonomy is exposed to a disgraceful situation. The liberal jurist, in view of the slavery relations, seeks to transfer the "shameful" issue to another normative statute, the "Black Code", which was reduced to a temporary ("odious") exception, since it was not "suitable for posterity". In an effort to affirm the liberal coherence of the *Consolidation* by resorting to the anti-liberal exception, Teixeira de Freitas intended not only to maintain the semantics of legal liberalism – which referred to normative structures – in consonance withthe economic structures of world society at the time, but also to adjust it to the local semantics regarding the structures of normative expectations which supported slavery. The ideal of legal liberalism was, in this manner, pervaded and delimited by a slavery regime which was in accordancewith the structures of cognitive (economical) expectations of the world society and fortified by the semantics of identity concerning the normative structures of the Brazilian monarchic state. Ideas roamed, migrated, with no commitment to their eventual *topos* of origin.

The difficulty faced by Teixeira de Freitas was even greater because the constitutional text of 1824, as the formal basic normative structure of the Brazilian empire, implicitly predicted slavery. Although this nuance was not taken into account, leading to the belief that – contrary to the project of the 1823 Constituent Assembly – the Constitution of 1824 did not predict slavery, it did indirectly recognise the slavery regime by distinguishing, in article 6, item I, between freeborn [*ingênuos*] and freed [*libertos*] citizens. This distinction is only meaningful in slave orders, for the condition of being freed presumes a prior situation of slavery in contrast to those who were born free.[27]

It was in this context that, on 10 January 1859, Teixeira de Freitas was hired by the imperial government in order to elaborate a draft of a civil code.[28] This

26 Freitas (2003 [1857]) vol. I, XXXVII. See Surgik (1988); Meira (1983) 113–114; Mercadante (1980) 188.

27 Oddly, in their comments about article 6, item I of the imperial Constitution, neither Bueno ([1857] 450–453) nor Sousa ([1867] 40–53) nor Rodrigues [(1863] 10) made any reference to this issue.

28 Nabuco (1997 [1897–1899]) 1053; Meira (1983) 185; Pontes de Miranda (1981 [1928]) 80.

time, his task was not to elaborate an artefact of systematic self-description of the dominant normative structures, but to get directly involved in the reform and transformations of these structures, at least in their textual formal aspect.[29] The draft was not concluded, not having been completed the third book of the special part, which referred to common provisions relating to rights "*in persona*" and rights "*in rem*".[30] Finally, in 1872, the contract for the elaboration of the project was revoked because the government did not accept the idea defended by Freitas of elaborating a general code of private law.[31] In a proposal sent to the government in 1867, Freitas stated the following:

> "The government wants a Project of Civil Code to function as a subvention to the complement of the Commercial Code; it aims to preserve the existing Commercial Code with its intended revision, and today my ideas are different, unwaveringly resisting to this calamitous duplication of Civil Laws, not distinguishing, within the entirety of the laws of this class, a branch that demands a commercial code. The government only wants from me the writing of a Project for a Civil Code, and I cannot deliver this project, even if it comprises what is called Commercial Law, without starting with another code, which encompasses the whole legislation."[32]

Note that the Brazilian Commercial Code had been promulgated in 1850. Teixeira de Freitas claimed that it commercialised all civil relationships.[33] The relative ease with which the Commercial Code was approved contrasted with the obstacles that the government and the parliament imposed in relation to the *Draft*.[34] In this matter, the question of slavery is once again stressed. The Commercial Code was not dissonant with the slavery regime because the rural landlordswere involved in the relations of production and circulation of the global economy and needed a modern market regulation:

29 See Nabuco (1997 [1897–1899]) 1054.

30 Pontes de Miranda (1981 [1928]) 81; Gomes (1958) 19. See Nabuco (1997 [1897–1899]) 1054 ff.; Meira (1983) 186 ff. The *Draft* (Freitas [1983]) was originally published in 1864.

31 Nabuco (1997 [1897–1899]) 1062; Meira (1983) 361–362; Gomes (1958) 19, nota 18. However, the Justice Section of the State Council accepted the proposal, Nabuco (1997 [1897–1899]) 1060–1061; Mártinez Paz (1927) XIX; Meira (1983) 356–358; Alves (2003) 4.

32 *Apud* Nabuco (1997 [1987–1989]) 1057. The letter can be found in its entirety in Meira (1983) 352–356.

33 Freitas (1878) XI–XII. See Mercadante (1980) 184.

34 See Mercadante (1980) 189 ff.

> "Within the scope of the private law, the rural landlord […] could not do without a body of liberal laws that would regulate his relations as a seller with the market, where he placed, as a trader, what abounded from the production of his farm. In this field, his interests coincided with those of the exporting commerce of the port-cities. They were tied to exporters and commissioners or even to small traders in a complex of social, commercial and legal relations."[35]

Teixeira de Freitas reacted against the duality of private law because he was contrary to the "duplicity in our relations of production".[36] His "ingenious" escape from the matter of slavery, by proposing a "Black Code" apart from the *Consolidation of Civil Laws*, could no longer be a solution because, in thisnew context, the issue was the elaboration of the project of "a Code in consonance with legal individualism".[37] The *Consolidation* served to maintain the existing normative structures, whereas the *Draft* would serve a codification based on liberal individualism. The former could coexist with the slave regime, but the latter was exposed to a paradox: the individualist codification of private law – liberal and universal under its semantic self-description – supposed overcoming the slavery regime or, at least, if approved, it would call this regime into question. In this sense, the *Consolidation*, in conformity with the social structures of slavery, was a decisive factor for the *Draft* not having been adopted, revealing an evident "incompatibility between legal individualism and the objective conditions of the Brazilian economic reality".[38]

In this regard, it is noteworthy that although it was not adopted in Brazil, the *Draft* had a great influence on the legislation of other countries, such as Argentina, Uruguay, Paraguay and Chile.[39] In these countries, however,

35 Mercadante (1980) 184.

36 Mercadante (1980) 190.

37 Mercadante (1980) 188.

38 See Mercadante (1980) 191.

39 Pontes de Miranda (1981 [1928]) 63; Mercadante (1980) 194. About the repercussions of the work of Teixeira de Freitas in other countries (including European ones), see Meira (1983) 387 ff. In Argentina, Dalmacio Vélez Sársfield, when presenting the first book of the Project of the Civil Code to the Minister of Justice, on 21 June 1865, declared that he had consulted many foreign codes "and, above all, the Project of the Civil Code that is being made for Brazil by Mr. Freitas, from whom many articles were taken", *apud* Meira (1983) 288; see Mercadante (1980) 194, note 24; Pontes de Miranda (1981 [1928]) 80. In his turn, Senator Carlos Serrey declared that the Argentinian Civil Code "Constitutes a matter of honor for doctor Vélez Sársfield and for the Brazilian jurisconsult Freitas, his main guide" (*apud* Pontes de Miranda, *ibidem*). In this respect, see, in detail, Meira (1983) 267 ff.; Mártinez Paz (1927), especially XXXII–XXXIII and XLV–XLIX; Levaggi (1988).

slavery had already been abolished, enabling the adoption of the individualist codification of private law, which was evidently adapted to the local variables.

These considerations about the failure of the civil or unified codification of private law in the Brazilian empire,[40] which maintained slavery until its decline, contain evidences which could reveal the very limits of displacing ideas to diverse legal-political contexts. Without a doubt, legal liberalism implies ideas that are constructions belonging to the semantics of world society in the 19th century. In this domain, although permeated by normative semantics of the national state's identity, these constructions circulated with their particularities in the political and legal discourse of the Brazilian Empire. However, because they intended to be enforced and to have an institutional form as a structural artefact with a normative character in the local sphere, they were exposed to almost insurmountable obstacles: the slavery regime, pertaining to the economic structure of the world society in the 19th century and legitimised by the local normative semantics and structure of authenticity, made unlikely the institutionalisation of individual liberal ideas through the codification of civil law. Therefore, in these circumstances, in terms of structure, "the revocation of the Ordinances would only be put into effect with the end of the slavery regime".[41]

However, this statement should not be interpreted in terms of an excluding determinism between civil codification and slavery. For instance, the Louisiana Civil Code provided for slavery. The assertion should be understood within the limits of the Brazilian context and the intent of Teixeira de Freitas to remain faithful to the liberal legal ideas.[42] Moreover, it would be

40 In addition to the *Draft* from Teixeira de Freitas, two other attempts of civil codification in the Brazilian Empire were made, also unsuccessful: the projects by Nabuco de Araújo, see Nabuco (1997 [1897–1899]) 1062–1074), and Felício dos Santos, see Pontes de Miranda (1981 [1928]) 82.

41 Mercadante (1980) 194.

42 See Fonseca (2011) 24–25. It should by no means be forgotten that the liberal economic semantics of world society interpenetrated with the slaveholding ideology of the Brazilian Empire, and in this regard there are no grounds for rejecting Bosi's remark (1971, 195) that: "The formally dissonant pair slavery-liberalism was a mere verbal paradox, at least in the Brazilian case." However, as argued in the Introduction, it is important to distinguish between the "factual" semantics of liberalism, grounded in the structures (cognitive expectations) of world capitalism, and the "counterfactual" semantics of liberal legal idealism, on which the *Esboço* was based to a certain extent and which was directly linked to political and legal structures (normative expectations). As for this latter semantics, it is possible to discern

more appropriate to consider not only slavery as an obstacle to liberal civil codification in Brazil during the 19th century, but also the disputes surrounding the meaning of citizenship in general.[43] One might add that the *Consolidation* – by practically assuming the role of a civil codification – was more suitable and "functional" to the structure of legal and social exclusion in the Brazilian Empire than a civil or private code with a strong liberal tendency, which could put in jeopardy the maintenance of the socio-political and legal-economic framework of the monarchist regime.

However, from the semantics perspective, the liberal individualist ideas on private law were circulating with functions and meanings that differed from those of the places in which they were originated, not only as political-symbolic artefacts of "ideological" self-descriptions of Brazilian social and legal reality, but also as reflexive and critical elements of the form of integration of the Brazilian state in world society. In this particular context, the paradox between global and local conditioned and stimulated the migration of liberal ideas concerning the codification of private law in Brazil during the 19th century.

3 From the liberal Constitution of 1891 …

After the abolition of slavery in 1888, which was one of the economic and social foundations of the monarchy, and in the context of the conflicts between the government and military and religious orders, the Republic was proclaimed in 1889 in a very singular manner, through a military coup, which was rather unexpected and incomprehensible to the populace.[44]

the existence of a paradoxical tension between the liberalism of the *Esboço* and the slave-owning ideology of the Empire. On this matter, Bosi himself admits (*ibidem*) that the content of the pair "slavery–liberalism" could be considered a "real contradiction if the concrete content of the second term, *liberalism*, were fully equivalent to the bourgeois ideology of free labour affirmed throughout the European industrial revolution". However, Bosi did not admit the differences which I take as my starting-point and which entail *paradoxes*, because he espoused a dialectical ontology of totality (hence his preference for speaking of a "contradiction").

43 Grinberg (2002), especially 319–321; Grinberg (2008) 47 ss.

44 According to the famed formulation from Aristides Lobo: "*The people watched the event in a bemused,* amazed, surprisedstate, without realizing what it meant. Many believed it to bea parade" (*apud* Maximiliano [1948] 105).

Summoned the Constituent Assembly (1890–1891),[45] Rui Barbosa, fascinated by the constitutional experience of the United States, offered a draft in which were emphasised liberalism, presidentialism and federalism. Although the project underwent some changes in the Assembly and, to a certain extent, the final documentdetached itself from North American constitutionalism, these features characterised the Constitution of 1891.

Firstly, it is important to observe that the constitutional ideas adopted in the normative textual structures conflicted, at the level of constitutional practice, with Comtean positivism which influenced the ruling military elite in the first years of the Republic, since it was understood from a perspective which allowed the justification of any violation of constitutional norms in the name of defending the "order".[46] This confrontation between the liberal ideas took shape in the constitutional text and the authoritarian ideas of the constitutional practice conducted by the military executive during the first years of the Republic is an evidence of the incongruity and complementarity between constitutional textualising and implementation.

With the Constitution of 1891, the relationship between constitutional text and the reality of the power process became even more problematic if compared with the constitutional experience of the Empire.[47] The declaration of individual rights and freedoms was expanded, and the principle of the "separation of powers" was affirmed in the constitutional document, but the subjacent social structure and the dominant political practices were reproduced, to a great extent, beyond the scope of the textual-normative contour of the Constitution. The permanent distortion or violation of the Constitution throughout the period during which it was in effect (1891–1930)[48] can be regarded as the most important aspect of the legal-political reality in the first Republic. What constitute significant expressions of the lack of normative

45 For a detailed exposition of the sessions of the Constituent and respectivediscussions, strongly imbued with American constitutionalism, see Roure (1918–1920). See note 57.

46 On the distortion of Auguste Comte's positivism at the time in Brazil, see Buarque de Holanda (1985) 289–305.

47 Although in another perspective (in the search for the identity of the "Brazilian society"), Buarque de Holanda (1988) 125 was aware of this issue and noted that, with the implementation of the Republic, the State "was uprooted" even more from the country. According to Faoro (1976) 64 "arbitrariness" was fortified. See also Carvalho (1996), espec. 379.

48 See Pacheco (1958) 240 ff.

concretisation of the constitutional text are: electoral fraud as a rule in the political game controlled by the local "oligarchies";[49] the degeneration of presidentialism in the so-called "neo-presidentialism";[50] primarily through excessive declarations of martial law:[51] the deformation of federalism through the "governor's politics"[52] and the abusive proclamation of federal intervention in member states.[53]

Among the conservative critics, supporters of an authoritarian, corporative and nationalist state, the problem of the lack of normative concretisation of the constitutional text of 1891 was denounced as a contradiction between "constitutional idealism" and "national reality".[54] However, in their criticism of the "utopian idealism" of the constituent legislator, the symbolic significance of the constitutional document was not accurately considered; on the contrary, the accent was on the ingenuity of its "good intentions".[55] In these terms, the Constitution would be an expression of misplaced ideas. The question whether the so-called "utopian idealism" was only adopted in the constitutional document insofar that the realisation of the respective principles was postponed to a remote future and, thus, the *status quo* was not threatened, was not part of the discussion. Furthermore, one cannot forget that the "nominalist Constitution" of 1891 functioned as an artefact of symbolic identification of the Brazilian legal-political experience with the North American (US) one, creating an image of a Brazilian state as "demo-

49 In this respect, see Neves (1992) 170–171. Clearly, the electoral problems were not reduced to constitutional practice because the lack of guarantee of secret vote fostered electoral fraud and the inexistence of voting rightsto illiterates and beggars (article 70, § 1º, clauses 1 and 2, of the Constitution) excluded from the electoral process a large portion of the population according to official data (IBGE [1989] 72), 65.1% of the population over 15 years of age were illiterate in 1900 and 64.9% in 1920. In addition, women were banned from voting until the electoral reform of 1932 (Decree 20,076, Feb 24, 1932) after the fall of the first Republic ad the revoking of the Constitution of 1891. From 1898 to 1926, the electoral participation oscillated between 3.4% and 2.3% of the population, according to Faoro (1985 [1958]) 620–621.

50 On this concept, see Loewenstein (1975) 62–66.

51 See Barbosa (1933), vol. II, 373 ff.; 1933, vol. III, 323 ff.

52 On the so-called "governor's politics", see, e.g., Faoro (1985 [1958]) 563 ff.; Carone (1969) 103 ff.; Carone (1971) 177 ff. Cardoso (1985) 47 ff. calls it an "oligarchic pact".

53 See Barbosa (1934) 17.

54 In this sense, see primarily Vianna (1939) 77 ff.; Torres (1978 [1914]).

55 See, e.g., Vianna (1939) 81, 91 and 111.

cratic" and "constitutional" as its model. At the very least, the rhetorical invocation of liberal and democratic values that were consecrated in the constitutional document worked to discharge the "owners of power", transferring to the supposedly "backward society" the "responsibility" or "blame" for the disrespect for the Constitution.

Nevertheless, the question should not be put in terms of an alternative between liberal idealism (illuminist, alienated) and authoritarian realism (authentic, deeply rooted). The ideas of liberal constitutionalism circulated among the civil sectors of an emerging middle class, which remained confined between privileged minorities tied primarily to rural estates and "subaltern" or excluded masses in the rural areas and cities. Rui Barbosa is a typical expression of this new middle class.[56] It is undeniable that there was a rhetorical exaltation of the American Constitution (such as occurred with French constitutionalism and English parliamentarism during the Empire) which was capable of cultivating the symbolic illusion that the simple transplantation of the Constitutional model of the United States would offer an adequate solution to Brazilian social problems.[57] In this sense, Oliveira Vianna spoke of the "belief in the transfiguring power of written formulas".[58] Notwithstanding, even Barbosa was not absolutely uncritical of the possibility of transferring North American institutions to Brazilian reality through the promulgation of the Constitution or legislation.[59] The issue lies in the fact that, in terms of the world society semantics at the turn of the 19th to the 20th century, the constitutional ideas circulated and migrated without a clear commitment to their origin. Barbosa was a jurist involved in this discussion at the time. The problem that is posed refers to the moment when these ideas were intended to take shape at the structural level of the constitutional norms, and, therefore, to influence the stabilisation of normative expectations fundamental to the life of states in such diverse social contexts. In truth, the comprehension of this question requires that the debate goes beyond the dichotomy between "idealism" (alienating, foreign)

56 Dantas (1962b), espec. 24, 27 and 36–38.

57 "But the sweetheart at the time was North-American presidentialism, which rapidly provoked the progress of the great friendly nation, as parliamentarism had provoked England's" (Roure [1920] 354.

58 Vianna (1939) 91; see also 81.

59 See Barbosa (1932) 30.

and "realism" (authentic, national) or between "real country" and "official country". It is only possible to understand the legal-political reality of the country ascomposed by "idealism" and "realism" in a relationship of both tension and complementarity. Thus, one must consider the dynamics of the dislocation of ideas (on the semantic level) in view of the normative structures and the operations of the legal-political practice.

The semantics of the liberal constitutionalism, articulated according to the terms of the North American experience, was assimilated in the sphere of normative structures by means of the constitutional formalisation of 1891. However, this semantics was intersected by the local semantics of authenticity, which later found structural expression in the authoritarian Constitution of 1937. Moreover, constitutional textualisation is a tenuous dimension and by itself is of little significance to the normative-legal structures. The normative expectations were pervaded by criteria of over-inclusion and under-inclusion in the legal and political systems.[60] A privileged minority acted outside the Constitution limits and the respective sanctioning mechanisms did not have any relevant practical meaning. The actions of the governmental bodies or agencies were not excluded from this situation. In this sense, Barbosa himself was emphatic in his comments on the Constitution:

> "One of the scourges which disgrace the country today are the so-called local state oligarchies, which are incited, explored, sustained and aggravated by the Federal Government, using, in order to do so, the sea and land military forces, and the civil army, which our innumerable civil servants offer".[61]

This practice of the over-included, located, so to speak, "above" the Constitution, was inseparable, during the first Republic, from the situation of the under-included or excluded from "below", who were beneath the Constitution. These were already excluded by the very constitutional provisions, which established that the illiterate and beggars, the major parte of the population, could not vote. Furthermore, beyond these constitutional provisions, the social exclusion of large segments of individuals and groups made the declaration of individual rights and guarantees irrelevant to them: depending

60 On the sub-inclusion (or sub-integration) and over-inclusion (or over-integration), see Neves (2005); Neves (1992) 94 ff. and 155 ff.; Neves (2006) 261 ff.

61 Barbosa (1934) 17.

on the urgent satisfaction of vital needs, most of them formally freed from slavery, lived as subordinates to masters and bosses or as socially insignificant bodies.[62]

The relations of over-inclusion and under-inclusion were a factor of obstruction in the constitutional concretisation and applicability. The Constitution was not concretised in a generalised way, but in a selective and particular manner, in accordance with the concrete constellation of interests of the over-included. It did not work primarily as a legal horizon for those who held the power, but was used, abused and unused in accordance with factual and casuistic conditions of the political relations of domination. In other words, the constitutional concretisation was strongly conditioned and limited by the arbitrary injunctions of the "owners of power". In this way, the Constitution imploded as a fundamental reflexive dimension of legal-political practices.

Would this mean that the ideas of individual liberal constitutionalism, at that moment inspired mainly by the experience of North American presidentialism and federalism, were "misplaced ideas"? In the Brazilian state of the first Republic (1889–1930), a territorially delimited legal-political *topos*, these ideas suffered a shift of meaning due to the relationship between politics and law as precariously differentiated functional systems. From a strictly legal-normative point of view, its constitutional textualising had little structural significance for the generalised stabilisation of normative expectations in terms of an adequate constitutional concretisation. This structural matter, by its turn, is inseparable from the operational problem, taking into account that communications and respective legal-political actions diverted from the textual model of theConstitution. However, from a political perspective, the liberal ideas incorporated to the constitutional text played a relevant yet ambivalent symbolic role. On the one hand, the text served as a certain constitutional self-illusion of the rhetorical and "ideological" identification of the Brazilian state with the constitutional experience in the United States and in the European states at the time. On the other hand, the constitutional text served the criticism made by intellectuals and the opposition with respect to the political and legal practices that violated the Constitution. In part, as previously stated, this criticism strived for the

62 Pontes de Miranda (1981 [1928]) 82–83, bearing racialist remarks. We return this issue in item 4.

authoritarian state, against "utopian idealism" and in favour of "organic idealism"[63] in accordance with the semantics of a national authenticity. But this positionalsopointed to a claim for constitutional concretisation and efficacy. Being included in this second strain of thought, Rui Barbosa, the main author of the project of the Constitution of 1891, was an expression of the ambivalence of this political-symbolic function of liberal ideas embodied in the constitutional text: his liberal rhetoric that praised the Constitution coexisted with his criticism of governmental practice. In the scope of this hypertrophied symbolic ambivalent function of the constitutional text which shaped the liberal legal-political ideas in terms of the North American experience, one did not take into account, however, the fact that the generalised legal-normative concretisation and efficacy of the Constitution required radical – not to use the term "revolutionary" – ruptures in the structure of society *in* Brazil during the first Republic. Evidently, for Brazil, this alternative was not in the historical horizon of possibilities of the world society at the time, a world society founded on a strong economic and social asymmetry between countries and regions.

4 … To the Civil Code of 1916

There is a close connection between the liberal Constitution of 1891 and the civil codification that was consolidated in 1916. The paradoxical articulation of individual liberal ideas, weak normative-legal structures and social structures with strong excluding potential develops asa process that begins with the formal constitutionalisation and solidifies with the codification.

In 1890, the provisional government put jurist Antônio Coelho Rodrigues in charge of elaborating a Project for a Civil Code which, concluded in 1893, was subsequently rejected by a commission nominated by the government and, later on, even though approved by the Senate (1896), was not pursued in the House of Representatives.[64] In 1899, the government invited Clóvis Bevilaqua, then Professor of Comparative Legislation at the Law School of Recife, to elaborate a new Project for a Civil Code. Having initiated its elaboration in April, in November Bevilaqua had already concluded his work.

63 See especially Vianna (1939) 9–13.

64 Brandão (1980) 19; Pontes de Miranda (1981 [1928]) 82–83. The complete text is available in Coelho Rodrigues (1980).

A committee constituted by the government revised the project and sent it to the House of Representatives in 1900. Having Sílvio Romero[65] as the rapporteur, the Project was approved in the House of Representatives with many modifications and submitted to the Senate in 1902. Having as rapporteur Rui Barbosa, whose report, presented on 3 April 1902, focused on restrictions against linguistic and grammatical formulations without really taking into account the legal aspect of most issues,[66] the project remained stuck in the Senate until 1912, when the House of Representatives finally began to discuss it. In both Houses of Congress the project originally revised by the government suffered many modifications and was only approved in December 1915, being sanctioned and promulgated on 1 January 1916 and put into effect on 1 January 1917.[67]

Although the code was, from a philosophical point of view, strongly influenced by evolutionism and positivism and, from a legal point of view, impregnated with the jurisprudence of interests (Ihering) and marked by a certain "legal sociology",[68] Clóvis Bevilaqua proposed a code which basically corresponded to the model of liberal codification of the 19th century,[69] which followed a conceptualist tradition of law. He did not intend to present, "like Freitas, an original and revolutionary work" but to select solutions found in prior projects, in foreign codes and in the law in effect in Brazil.[70] Despite its liberal nineteenth century posture, Bevilaqua's project (1899), in some fundamental points, proved to be less insensitive to the social transformations

65 His report was adopted by the Special Committee of House of Representatives on January, 18, 1902 (see Comissão Especial da Câmara dos Deputados, 1902).

66 See Bevilaqua (1906) 449–478, in response to the criticism by Rui Barbosa as expressed in his report (Barbosa [1902]) and in the famous *Reply* from 31 December 1902 (Barbosa [1904]), which led, respectively, to the answer and the "rejoinder" by Ribeiro (1902) 1905. On this controversy and its legal-political implications, see the pioneering study presented by Veronese (2013).

67 For a summary on the project's elaboration, its revision by the government and proceedings in the National Congress, see Pontes de Miranda (1981 [1928]) 83–86. On the involvement of Rui Barbosa, including his legal report presented in the Special Senate Committee in 1905 (Barbosa [1968]), see Dantas (1962c).

68 See Machado Neto (1969) 112 ff.; Dantas (1962d) 84 ff.

69 "The mental date of the Code (as with the B.G.B. and the Swiss Code) is very 1899; it would not be inadequate to claim it as the antepenultimate Code of last century [19th]", Pontes de Miranda (1981 [1928]) 85.

70 Dantas (1962d) 89.

of the 20th century than the Civil Code approved in 1916. In two aspects this difference can be clearly seen, namely in the social question and in the issue of family and gender.

Concerning the first aspect, the observations by Santiago Dantas are enlightening:

> "Bevilaqua had not incorporated, certainly, to the primitive Project, solutions which could represent the new legal conception of labour relations, similarly to what the German Civil Code did by distinguishing the service contract from the labour contract (§ 631), but his handling of the matter was much more advanced than the one that resulted from the modifications made in the course of the revision. Amongst the norms proposed by him, and excluded from the Code, there were the right to receive salary in the case of transitory inability to work due to sickness (article 1369), or the duty of medical assistance to domestic labour (article 137), the prohibition of industrial or mine labour to those under 12 years of age (article 1381), the limitation to six hours of labour to those under the age of 16 years (article 1382), the duty of the employer to eliminate insalubrious workconditions under penalty of answering for its consequences (article 1383)."[71]

As these embryos of labour legislation were rejected, labour lawonly started to be developed at the beginning of the 1930s, and the Consolidation of Labour Laws of 1940 was a landmark of its establishment in Brazil, remaining long time excluded from it protection the rural and the domestic worker.[72] The latter, until recently, was not covered by the regime of Government Severance Indemnity Fund for Employees, whose main role was to substitute the regime of work stability and compensation for time of service in the event of dismissal without just cause.[73]

Regarding the question of family and gender, although Bevilaqua was radically opposed to divorce, which he considered a retreat "from the moral standing of monogamy to the regime of successive polygamy",[74] and his project was strict in defining the husband as the head of the conjugal partner-

71 Dantas (1962d) 90.

72 The changes to legally include the rural worker only started to occur when the Rural Worker Statute came into effect (Law no. 4,214, 2 March 1963), but at a very slow pace and without the corresponding practical effects (see Moraes Filho [1982] 111–115).

73 The current restrictions to the rights of domestic workers are supported by the sole paragraph of article 7 in the Brazilian Constitution. The new Constitutional Amendment Nr. 72/2013 approximates the rights of domestic workers with all other workers' rights. However, the level of illegal informality in hiring domestic workers remains very high (73.3% in 2009; see Gomes (2011).

74 Bevilaqua (1906) 98.

ship (article 272), he was against the relative incapacity of the married woman for most acts of civil life,[75] the solution adopted by the Civil Code (articles 240–247 and 252) and only overcome by modifications introduced by Law no. 4,121 from 27 August 1962.[76] Article 279 of Bevilaqua's project stated that, through marriage, "the woman becomes the companion and partner of the husband", in contrast with the original text of the Civil Code which stated that the woman took, through marriage, "the condition of his companion, consort and assistant in domestic affairs". Through this perspective, although he expressed the ideasof his time on the differences between man and woman, Bevilaqua, unlike the Civil Code, pointed to a solution almost in line with equality between genders according to his own words:

> "Developing the same thought, seeking to meet the legitimate aspirations of women, and with the intention of making marriage an equal partnership, although under the direction of the husband, the Project conceded a larger sum of rights, more freedom of action to the married woman than the law that is currently in effect."[77]

He then added, "The *Project* intended to recognise women as equal to men, but without deviating women from the role that nature itself bestowed upon them, rationally interpreted".[78] However, he pondered: "The author of the *Project* is convinced that he was, in this topic, as liberal as he was allowed to be".[79]

It is interesting to add that, still pertaining to family matters, Bevilaqua's Project held in better regard the legal issue of the then called "illegitimate sons" thanthe solution adopted by the Civil Code,[80] distancing himself from the dominant moral and religious conceptions at the time in Brazil.[81]

With reference to the dispositions concerning family and gender, jurists who were interested in thehistoricalprocess of the codification attributed to the Civil Code – even more than to the original project – anti-liberal traits or,

75 See Bevilaqua (1906) 93–96.
76 On the changes attributable to this Law, see the succinct legal exposition by Bueno (1972).
77 Bevilaqua (1906) 93–94.
78 Bevilaqua (1906) 95.
79 Bevilaqua (1906) 96.
80 See Bevilaqua (1906) 99–105.
81 On this subject, Pontes de Miranda stated, "Clóvis Bevilaqua was the most favourable to women (articles 251 and sole paragraph, 254, 287, 393, and 414, I), to the rights of illegitimate sons (article 367) and family solidarity (articles 332, 409, 416, 447 and 467)" (Pontes de Miranda (1981 [1928]) 454).

at least, non-liberal ones. According to Pontes de Miranda, several passages within the Code "display the preponderance of the family, still patriarchal", constituting "law that was more concerned with the social sphere of the family than with the social spheres of the nation or the classes".[82] This position was corroborated by Orlando Gomes, who highlighted the influence of domestic privatism in its elaboration.[83] Regarding this matter, some dispositions – concerning the indissolubility of matrimony, the universal communion of goods, the possibility to opt for a regime of separation of goods, guardianship and curatorship and hereditary rights – were pointed out, all favouring the immensely privileged position of the husband as the head of the conjugal partnership, as for instance, the unconditionalright of the testator "to mark the assets of the heirs, even those to be acquired as their legitimate part, with a lifelong inalienability clause".[84] Specifically related to the question of gender, article 236 – which prescribed as valid, without the consent of the wife, "nuptial donations made to the daughters and donations made to the sons due to the occasion of their marriage, or of the establishment of a separate household" – reflected, according to Pontes de Miranda, "the precarious situation of the Brazilian woman": "It should have included the daughter, who, not getting married, wished to establish an autonomous life, a "separate household".[85]

This prevalence of the family sphere was associated with legal affectionateness, tolerance and benevolence.[86] The very author of the original project, Clóvis Bevilaqua, claimed that "Brazilian civil law can be considered an 'affective law' because many of its most characteristic dispositions were made due to sentimental motives", adding that "two general principles can be found as propulsive or inspiring energies for our legal life (legislation, doctrine and jurisprudence): the "feeling of freedom" and "idealist impulses".[87] This suggestion of the prevalence of a "jurisprudence of feelings" in Brazil was criticised by Pontes de Miranda due to its "despotic" elements. But he also connected it to a "legal benevolence" that was, on the one hand,

82 Pontes de Miranda (1981 [1928]) 443.
83 Gomes (1958) 21–35.
84 Gomes (1958) 24–28.
85 Pontes de Miranda (1981 [1928]) 449.
86 Pontes de Miranda (1981 [1928]) 441 ff.
87 Bevilaqua (1975 [1922]) 193.

criticised on the basis of racialist arguments and, on the other hand, confused with "excessive liberalism".[88] In fact, expressions such as "affection" and "benevolence" were used in an ideologically simplifying manner, diverting the attention from problems regarding asymmetries, relations of dependency and exchanging of favours, and the still patriarchal dominance within the family. Moreover, even if the presence of an "affectionateness" is taken into account as a factor of rulemaking and adjudication in private law, this trait would have to be defined as somewhat opposing individualist liberalism and considered, above all, in its oppressive facet, as it was related to the arbitrary power of the socially privileged at the expense of the weakest. Therefore, instead of taking seriously expressions such as "affective law" and "legal benevolence", it would be more appropriate to relate the influence of the so-called "domestic privatism" with the persistence of a ruralframework in the first decades of the Republic which, despite the abolition of slavery, still maintained practices of exclusion, privileges and dependency relationships that were analogous to the social structure of the Empire.

Therefore, the issue of gender and family relates directly to the "social question". In this respect, Orlando Gomes emphasised that the Civil Code did not adopt anyclause concerning social rights and labour relations and overlooked changes taking place in Europe.[89] The Code had remained faithful to the legal individualism of the 19th century. In fact, as previously stated, there was nothing in the Code regarding work accidents, protection of workers in case of sickness, prohibition of child work, limitations to the labour journey and protection of workers in insalubrious working conditions. The various

88 Pontes de Miranda (1981 [1928]) 444 ff. Concerning racialism, this author stated: "Legal benevolence, the exaggerated affection, which Clóvis Bevilaqua later recognised as characteristic, and showered it with compliments, constituted an energy defect, a result of the Black element mixed in the population […]. The Black and the Indian represented biological influences, and not sociological, that is, from social facts to social facts. There are no institutions of Black or Indian law in Brazilian law; but there are Black and Indian factors in the way of being and in the legal activity of the Brazilian: these influences must be eliminated and it is beneficial that the extirpation of the inconvenience they cause is done quickly" (*ibdem*, 445–446). Therefore, he defended the opportunity of "eugenic measures" (447). Also in accordance with the dominant racialism at the time, Bevilaqua (1975 [1922] 194) referred to Blacks and Indians as "affective races". On this matter, see Grinberg (2008), especially 34–37. On Bevilaqua's "racism", see Machado Neto (1969) 125.

89 Gomes (1958) 51 ff.

attempts presented in the debates to ensure minimum elements of social rights failed.[90]

According to Orlando Gomes, Clovis Bevilaqua himself, author of the original project, "assumed, in a clear and firm way, a categorical position against innovations regarding the social question".[91] In defence of the project, Bevilaqua really showed mistrust in what he defined as "socialism", even in the sense of recognising rightsin the terms of a social state, which, according to him, could "turn into a socialism that absorbs and annihilates individual stimulus".[92] He argued that, "social private law cannot be something other than the balance between the interests of individuals and society", supporting that, apart from these parameters, reforms "will be subversive".[93] However, it is important to note that in the social context of the authors involved in the elaboration, the individualism that prevailed in the Code went far beyond the precautions of Bevilaqua with what "it contains of exaggeratedly selfish and disorganising".[94] The code had not erased, in the words of the redactor of the project, "the stain of bourgeoisie that tarnishes the prevailing civil codes".[95]

This issue emerged primarily in the discussions about hiring of services from the Special Committee of the House of Representatives.[96] A strong conception of autonomy of will frustrated any attempt to establish a distinction between a service contract celebrated in the sphere of private autonomy and an employment agreement. Not even the most rudimentary elements of worker protection present in Bevilaqua's original project were admitted. In this "legal individualism which was hostile to all legislative labour regulation",[97] Pontes de Miranda identified a law that was more concerned with "an undisguised capitalism, although innocently convinced

90 Gomes (1958) *ibidem*.

91 Gomes (1958) 57.

92 Bevilaqua (1906) 41. "And I speak only of this socialism that is presented as an empirical solution to the harsh contingencies of the present, and not of this genuine product of mental anarchy that charges against property, family and govern organisation, without knowing which forces will take the place of the ones it intends to eliminate" (*ibidem*). This second feature of socialism was defined as "ferment produced by a state of unrest, embarrassment, and revolt that torments a significant part of mankind" (42). See Gomes (1958) 43.

93 Bevilaqua (1906) 40.

94 Bevilaqua (1906) 41.

95 Bevilaqua (1906) 40.

96 See Gomes (1958) 58 ff.

97 Gomes (1958) 61.

of its function of solidifyingsocial justice".[98] In turn, according to Orlando Gomes, "the dominant mentality at the time was transfused with such objectivity into the codified rules regarding the service contract chapter, that none other could express it more clearly".[99] However, this kind of focus overestimated the relationship between social substratum and legal text, without considering the limits of the latter's normative force.

Concerning this matter, more than considering the particular conditions of the liberal ideas of codification in the context of the so-called "domestic privatism" and the choice for an individualistic liberalism that was dominant in 19th century Europe, one should observe, firstly, the practical significance of the codification in the process of concretisation and applicationof civil law. How would an extremely liberal code in the matter of labour relations stand in a society that was still mostly rural, in which monoculture in the agrarian large properties was the main driving force of the economy and the social life? Between the rural landlords (associated with importing and exporting in the commercial sector) and all of those who depended on them or were socially excluded, a tiny urban middle class was still in development. In this context, whereas landowners could "be protected from attacks against their fundamental interests", the regime of "liberal franchises benefited only a measly number, being strange to the vast majority of the miserable and uncultured population".[100] From the social-legal point of view, these were relations of over-inclusion and under-inclusion, i.e., between, respectively, those "above" and those "below" the civil law. After slavery was abolished, the vast majority of the population consisted of, in the words of Sílvio Romero and seconded by Orlando Gomes, the "impoverished by inertia", and not of rural and industrial workers who were capable of claiming their rights.[101] With no access to elementary civil rights, these miserable people who roamed the countryside and towns and who could, at most, find jobs sporadically, engage in informal work relations or be incorporated as domestic servants, always outside the scope of the law.

With regard to the service contract, Pontes de Miranda – despite his racialist explanation of the problem[102] – was aware of the incompatibility

98 Pontes de Miranda (1981 [1928]) 443.
99 Gomes (1958) 66.
100 Gomes (1958) 46.
101 Romero (1894) XXXIV; Gomes (1958) 39–40.
102 See *above* note 88.

between the Code's liberal individualism and "menial relations": "the Brazilian servants did not claim – it was as if they continued to serve, *freed*, the old lord; the attempts to modernise the service contract were unsuccessful, because they were hindered by a double indifference: of the master and the domestic servant".[103] Without a doubt, a double indifference founded on the extreme asymmetry of positions, which made the former immune to obligations and the latter deprived of rights. This situation, despite all the transformations in labour law in Brazil, in part persists among the domestic service relations which are so abundant in the country.

One cannot entirely deny that the promulgation of a liberal individualist civil code in a context of extreme social inequality – with labour relations still permeated by slavery – may be interpreted as a "copy", "importation" or "transplant" of foreign law with "inevitable deformations" and no commitment to the country's social reality.[104] It is from this perspective that one should attempt to understand the statement by Pontes de Miranda: "The Brazilian Civil Code, in what it concerns Clóvis Bevilaqua, is a codification for the Law Schools more than for life".[105] Orlando Gomes, when referring to the transplant of "alien institutions, which in those regions [of more "advanced"peoples] have begun to wither", claimed that the Code "anticipated itself to reality", "presenting itself as an approximation of the reality of the future".[106] This ambivalence suggests that it was not simply a "transplant", "importation" or "copy" of institutional artefacts.

The private codification in the second decade of the 19th century must be understood in the context of the abolition of slavery and of liberal constitutionalisation due to the proclamation of the Republic. Here, also, the liberal ideas of individualist private law were permeated by local conditions, from the perspective of both the structure of normative texts and the legal practice.Liberal legal semanticswas not only pervaded by anti-liberal or non-liberal notions of the jurists, but also by social structures that were incompatible with liberal individualism. This phenomenon impacted the very text of the code, particularly family law. Therefore, in the sphere of legal structures, textual institutionalisation implied a certain dislocation of the

103 Pontes de Miranda (1981 [1928]) 445–446.
104 Gomes (1958) 45.
105 Pontes de Miranda (1981 [1928]) 86–87.
106 Gomes (1958) 43 and 72.

liberal ideas on codification. Nonetheless, the greater issue seems to relate to the limits of the normative-legal concretisation of the Code in an adverse social context. How does liberal individualism present itself in relationships of dependency developed within networks that stabilise expectations of favour exchanging, reciprocal benefits, loyalties and urgent supplying of needs beyond the margin of codified civil law? In these conditions, its meaning and functions dislocated.

This does not mean, nevertheless, that civil codification based on individualist liberalism was socially irrelevant. The Code's weak normative-legal force was connected to its political-symbolic function which was ambivalent, such as the liberal Constitution's one. On the one hand, it constituted a self-illusion of codification as an expression of the emancipation of civil relations in Brazil, which would be approaching the codifying experience in Europe; on the other, the invocation of the Code served as a form of criticism of the legal and political practices developed beyond the scope of the code itself. In the terms of this ambivalence, a postponement of its complete fulfilment to an uncertain future impregnated the legal and political debate about the Code. One did not consider, however, that a satisfactory legal-normative concretisation of the Civil Code would presuppose radical transformations in the social structure *in*Brazil at the beginning of the 20th century, an unlikely alternative in the historical horizon of possibilities for Brazil in the world society at that time.

Are these misplaced ideas? It seems to be more appropriate to say ideas in another place, among so many places in the world society. Nevertheless, given that liberal codification ideas were part of world society, could we not say that they are ideas in the same place? This paradox between global and local or regional nurtures the reproduction of political and legal ideas at least as long as states exist as territorially delimited organisations: migrant ideas in a *unitas multiplex*.

5 Final Observations

The issues addressed here concerning the function and meaning of the liberal constitutionalisation of 1891 and the codification of civil law in 1916, impregnated by liberal ideas established in Europe and the United States since the late 18th century, were not an isolated phenomena in the development of political and legal ideas and institutions in Brazil. Similar variables

regarding the migration of ideas and the transmutation of institutions persisted throughout the legal experience of the 20th century, leading to problems that endure – evidently in very different ways and measures – until today.

The same problems were reposed in the presence of "critical" legal thought in the perspective of a social or even socialist state during the 1920s and 1930s: social-democratic ideas, although adopted by the Constitution of 1934, were of little significance to the majority of the population; and the authoritarian ideas of the Constitution of 1937, in addition to not being "authentically national", as its defenders claimed,[107] had their legal efficacy suspended during the entire stretch of the "New State" (1937–1945) due to a transitory disposition (article 187).[108] The search of this "critical" thought for a "real, profound country", as opposed to alien ideas, was not new and could not, in any way, be linked to the modern art week of 1922.[109] The subject of a "real country" as opposed to an "official" or "legal country" has been discussed since the second half of the 19th century. What changed was the content of the debate, which focused on the adequacy of social-democratic, socialist and fascist ideas for the Brazilian legal-political context. However, these ideas were not more nor less authentically Brazilian than the individualist liberalism that was previously dominant. In both cases, they were ideas in another place of the world society.

The migration or shifting of individualist liberal ideas oriented towards constitutionalisation and codification should not be interpreted, in a generic manner, in terms of symmetric relations in the world society. That is, saying that they were "in the air"[110] is not enough. Although dealing with this issue merely as a search for "causal influences"[111] is impertinent, one cannot deny

107 Loewenstein (1942) 122 characterised it as "international tutti-frutti" and "constitutional cocktail".

108 However, article 180 of the Constitution of 1937 stated that it was up to the President of the Republic to "issue law-decrees on all matters of legislative competence of the Federal Government".

109 See *above* note 1.

110 As suggested by Lopes and Garcia Neto (2009) 2, in relation to "critical" thinking in Brazil in the 1920s and 19330s. In the definitiveversion published in Spanish, these authors removed this expression from the quoted text (see *idem* [2011] 106), but the argument remains in the article.

111 Lopes and Garcia Neto (2009) 2.

asymmetries in the circulation of these (and other) legal-political ideas within world society when they move through various states.[112] Concerning the post-colonial Latin-American period, being unaware that there were centres that were predominantly irradiators and peripheries that were primarily receivers of liberal ideas meant leaving aside some crucial aspects of the legal and political experience of these countries.[113] Regarding Brazil, the presence of a certain cultural colonialism is undisputable.[114] In this sense, one cannot completely exclude the terms "importation", "transplant", "copy" and "imitation", among others, as well as the notions of "deformation" of ideas and "impurity" of theories.[115]

However, this does not mean that they are "misplaced ideas" because, permeated by local semantics and conditioned by structures of the world society in the respective state, they have significance and perform functions in terms of legal and political institutions and of social practices. In this respect, embodied at the institutional sphere of legal and constitutional textualising, liberal ideas, already pervaded by inescapable local political and legal demands, exerted primarilya symbolic function, to the detriment of their normative-legal force. And the symbolic function serves ambivalently both to deny and enforce or expand rights. In another perspective, Schwartz – in an essay revising his own original formulation about "misplaced ideas" – affirmed, in reference to imperial Brazil, something that could come close to this formulation:

112 The conception that Eisenstadt's model of multiple modernity does not support asymmetries seems mistaken. In Eisenstadt's work (2000), when speaking of the "origin" of modernity in Western Europe and of the "Euro-Western modernity transformation in America (the USA example)", of the transformation of "western modernity in Asia (the Japan example)" and of the "fundamentalism as modern movement against modernity" (these are the titles of the chapters in Eisenstadt's book), an asymmetry is pointed between centres that irradiate structures and ideas (semantics) and social spaces that reproduce,transform or confront them.

113 "It is not only about relativizing the opposition between local and universal, but also of seeing the perverse reciprocities between former colonies and imperialist nations, underdeveloped and developed, peripheral and central, etc., political oppositions more revealing and meaningful" (Schwarz [2012] 170). On this subject, the criticisms levelled at Schwarz's position by Franco (1976) and Bosi (2010), especially 400, appear to tend towards simplification. See note 42, *above*. Cf. also Schwarz (2012) 171–172.

114 Montoro (1973).

115 Medina (2008).

> "Well, in the former colonies, based on forced labour, liberalism does not describe the real course of things – and in this sense it is a misplaced idea. However, this does not prevent it from having other functions. For instance, it allows the elites to speak the most advanced language at the time and to, simultaneously, take advantage of slave labour at home. Less hypocritically, it can be an ideal of equality before the law, for which the dependent and slaves fight. The range of its functions includes utopia, real political objective, the distinctiveness of class and pure cynicism, *but excludes the believable description of everyday life*, which renders it realistically dignified in Europe."[116]

Nevertheless, it seems that the conception of "misplaced ideas" should be eliminated, as well as its corollary, the non-description of reality. Firstly, it is important to consider that the liberal ideas of a constitutional or legal nature were related to the normative dimension of social structures, not having a primarily descriptive function. Therefore, in the law field, the main issue is not to describe "reality". Secondly, distinguishing between "legal" or "official" and "real" is not appropriate within the legal scope of constitutionalisation and codification. The inefficiency of "legal" or the distance of the "official" in relation to the "people" or, rather, the majority of the population is part of the political-legal "reality", which implies everyday practices. Consequently, I insist that instead of "misplaced ideas", it would be more appropriate to say that liberal ideas undertook different functions in the various political-legal *loci* organised into states; however, they belong to the semantics of the world society in which they circulate. Thus, the conclusion: the liberal ideas incorporated into the Brazilian Constitution of 1891 and the Brazilian Civil Code of 1916 were, paradoxically, *ideas in another place* (the society *in* the scope of the Brazilian state) and *in the same place* (the world society).

116 Schwarz (2012) 170–171. See *above* note 5.

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